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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 353

EMORY S. LAND, EDWARD MACAULEY, JOHN M. CARMODY, RAYMOND D. McKEOUGH, WILLIAM W. SMITH, RICHARD PARKHURST, GRENVILLE MELLEN and J. K. CARSON, JR.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER,

Respondents.

Brief of Respondents in Opposition To Petition for Writ of Certiorari

STATEMENT

The case may be succinctly stated by quotations from this Court's opinion in *Land v. Dollar*, 330 U.S. 731.

"Petitioners are present and former members of the United States Maritime Commission. Respondents are stockholders of Dollar Steamship Lines, Inc., Ltd. (Dollar of Delaware), whose corporate name was changed to American President Lines, Ltd. * * *. It is sufficient for purposes of the various questions presented by this case to say that the

All emphasis in quotations has been added.

Commission and respondents entered into a contract in 1938 by which respondents delivered their common stock in Dollar of Delaware, endorsed in blank, to the Commission * * *. (733)

"* * * By 1943 American President Lines, Ltd., had fully paid all indebtedness due the United States. Respondents thereupon demanded return of their shares of stock from the then members of the Commission, claiming that the shares had only been pledged as collateral for a debt which had been paid. The members of the Commission refused to surrender the shares, claiming that they had not been pledged under the 1938 contract but transferred outright. * * *

"Thereupon respondents instituted the present suit in the District Court for the District of Columbia * * * claiming that petitioners were unlawfully in possession of respondents' stock and illegally withholding it. The prayer was that petitioners be restrained from selling the shares and be directed to return them to respondents. * * * the District Court on its own motion dismissed the complaint with prejudice, holding that the suit was against the United States. The Court of Appeals reversed. 154 F.2d 307. * * * (734)

"* * * this is the type of case where the question of jurisdiction is dependent on decision of the merits.

"The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. *That conclusion would follow if either of respondents' contentions were established:* (1) that the Commission had no authority to purchase the shares or acquire them outright; *or* (2) *that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.* (735, 736) * * *

"* * * *if it is decided on the merits either* that the contract was illegal *or that respondents are pledgors, they are entitled to possession of the shares as against petitioners,* though, as we have said, the judgment would not be *res judicata* as against the United States." (739)

This Court thereupon affirmed the decision of the Court of Appeals, the cause was remanded to the District Court, and subsequently tried. The vast bulk of the evidence was documentary, authenicated by stipulation, and most of the remainder was likewise stipulated (cf. R. 285-7, 297). There was some oral testimony, but it was without conflict.

The District Court held that the contract of 1938 was one of sale and not of pledge. It also held that the Commission had power to take absolute title to the stock.

On appeal the Court of Appeals reversed (R. 2159). It did not pass on the question whether the Commission had power to take absolute title. "We do not decide that question," it said, "because we do not reach it." (R. 2147.) It did not reach it because it found that the 1938 contract was not a sale but a pledge (R. 2158). Consequently, it was unnecessary to decide whether, had it been a sale, the transaction would have been within the Commission's authority, for, as this Court had held, the conclusion that "petitioners are unlawfully withholding respondents' property * * * would follow * * * even though such authority existed, [if] the 1938 contract resulted not in an outright transfer but in a pledge of the shares." (330 U.S. at 735, 736)

Having found that the contract was for a pledge, the court below then followed the command of this Court that, "if it is decided on the merits * * * that respondents are pledgors, they are entitled to possession of the shares as against petitioners * * *." (330 U.S. at 739)

In reaching its conclusion as to the nature of the 1938 contract, the court below made it plain that it did so because "any other conclusion * * * would be *wholly untenable* in our opinion" (R. 2157).

The petition contains a highly colored, incomplete and inaccurate statement of facts, culling bits of evidence from a record of more than 2000 pages, interspersed with inferences and argument, which it hopes sustains petitioner's contention that the con-

tract should have been construed as a sale. Some of the factual assertions are erroneous and unsupported by the record references given by the petition.*

But we shall not discuss these matters because we think them irrelevant to any question properly presentable on application for certiorari (see pp. 13, 14, infra) and because *the opinion of the Court of Appeals thoroughly and comprehensively reviews the facts. The petitioners make no claim that this review is inaccurate or omits any of the controlling facts.*

QUESTIONS PRESENTED

We do not agree with petitioners' statement of the questions which they seek to present. A more correct statement is the following:

1. This Court has held that a particular suit to recover possession of personalty is not one against the United States if the transaction by which government officials had obtained possession was a pledge, and it remanded the case for trial to determine the nature of the transaction. Thereafter the court below determined on the merits that the transaction was a pledge. May the defeated party obtain certiorari in order to argue that this Court should reconsider and reverse its prior decision?

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*By way of example:

(1) It is said (Pet. 4, without record reference) that Dollar of Delaware was in default on obligations to the government prior to the execution of the contract in August 1938. In fact in had not been in default at all for over six months (Second Blue Book, 231, R. 282).

(2) It is said (p. 8) that a certain accountant's report was "approved by the stockholders of Dollar of California." The stockholders approved no report but only a balance sheet not containing the material referred to (R. 1514).

(3) It is said (p. 8) that Mr. Dollar and Mr. Lorber in their respective tax returns wrote off ownership on the ground they had transferred "all right, title and interest." Neither wrote off ownership, and the quoted words do not appear in the tax returns or anything else pertaining to Lorber (R. 1760-63). Certain testimony re Lorber cited in the petition, R. 1765-69, was stricken by the trial court.

2. In reversing a trial court, a Court of Appeals makes it plain that it has done so because it is convinced that the trial court's determination is clearly erroneous and that on the entire evidence it is left with the definite and firm conviction that a mistake had been committed. Is the Court of Appeals required in its opinion to express its reasons in exactly those words?

ARGUMENT

I.

There Is No Merit in the Attempt to Obtain Certiorari on the Claim That This Is a Suit Against the United States

The contract of 1938 was a pledge. It is on this postulate of fact that the issue whether this is a suit against the United States is now tendered and must now be judged, for this is the fact as determined by the court below.

This Court has already decided this very question against petitioners in this very case. *Land v. Dollar*, 330 U.S. 731.

Petitioners do not claim that the court below misread that decision. What they claim is that subsequently, in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, this Court changed its view of the law.

Larson did not make any change whatever in the law applied in *Land v. Dollar* or any change in the doctrine of *United States v. Lee*, 106 U.S. 196, as followed in *Land v. Dollar*.

But before showing that to be so, we note the truly extraordinary nature of petitioner's request for reconsideration. When petitioners in 1946 applied for certiorari in this very case, respondents objected that the decision of the Court of Appeals then sought to be reviewed was interlocutory only, since it remanded the case for trial, and they referred to the principle that certiorari is not ordinarily granted to review such a decision. Recognizing that principle, this Court stated why it nevertheless granted the writ: —

> "The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented." (330 U.S. 734)

and explained (footnote 2, p. 734):

> "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case'."

This Court then decided that issue. It laid down, as the "law of the case," that if respondents should prove that the 1938 contract was a pledge, the suit was not one against the United States and respondents would be entitled to recover. This Court further held that if respondents established that fact,

> "The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." (330 U.S. 738)

Although this Court in 1946 departed from its usual rule not to grant certiorari at an interlocutory stage and did so in order to settle the issue as a guide for future conduct of the case, and although it then settled the issue, petitioners now, nearly four years later, seek a belated rehearing and ask the Court to reverse itself.

Petitioners argue that the doctrine of the "law of the case" is only a rule of practice, not a restriction on power. But it is a rule of practice strictly adhered to because it is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter, and because "orderly judicial action, except in unusual circumstances, requires it [the court] to refuse to permit the relitigation of matters or issues previously determined on a former review." *Insurance Group v. D. & R. G. W. R. Co.,* 329 U.S. 607, 612.

As said in *Roberts v. Cooper,* 20 How. 467, 481:

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. * * * there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."*

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*See also *Clark v. Keith,* 106 U.S. 464; *In re Sanford Fork & Tool Co.,* 160 U.S. 247, 259.

A court should depart from its former determination in a particular case only "if a clear case were presented showing that the earlier adjudication was plainly wrong and that application of the rule would work manifest injustice." *Brown v. Gesellschaft, etc. Co.*, 104 F.2d 227, 228 (D.C. Cir.); *Davis v. Davis*, 96 F.2d 512, 515 (D.C. Cir.).*

We submit that here the very reverse is the case and that petitioners' request for review of the issue is nothing short of amazing. Relying on the "law of the case" as announced by this Court in 1947, respondents have gone through years of litigation and have incurred great expense in preparation, trial and appeal. A citizen has pledged his property to the government to secure a debt; for that purpose he has entrusted custody to government officials; thereafter the debt is paid. The right of the government officials to retain possession has ceased. The owner is entitled to the return of his property. Never at any stage of the litigation have petitioners suggested that they may lawfully withhold possession if the 1938 transfer was by way of pledge. *They do not so claim even now.* Yet the officials refuse to return possession, and the citizen sues to regain it. If such a suit is held to be one against the United States, the citizen has no remedy. He has no remedy in the Court of Claims, since his cause of action sounds in tort and not contract. Moreover, his just claim is for the return of his property, the kind of relief which the Court of Claims cannot give, and, as this Court said in *Land v. Dollar*, 330 U.S. at 738:

> "And where they [public officials] wrongfully seize *or hold* a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment."

We submit that to depart from the "law of the case" would here be "manifest injustice."

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*The very meaning of the "law of the case" is that a prior decision of the court fixes the law for the purpose of the particular case even though the court should later believe that its decision was erroneous.

Nor does *Larson* lend any support to the request that this Court do so. There plaintiff claimed that it had purchased certain property from the United States through the War Assets Administrator, and that the Administrator was breaking the contract in refusing to deliver. Plaintiff's suit, in essence, was to compel specific performance by the vendor, the United States. Ownership was sought to be derived from the United States, and a decree of court was necessary to effect that transfer to plaintiff.

Here respondents claim no title through or from the United States. Ownership started in respondents and, the contract being a pledge, ownership never left them. Possession is returnable not because of any contractual promise but on common law tort principles (*Land v. Dollar,* supra, at 736).

When the case was last here this very distinction was recognized by the Court in its opinion (330 U.S. 731 at 737, 738). The Court expressly noted (330 U.S. at 737) that this case is *not* like *Goldberg v. Daniels,* 231 U.S. 218. By contrast, in the *Larson* case the court noted that *Goldberg v. Daniels* "present[ed] a parallel to the facts" of the *Larson* case (337 U.S. at 700, 701, and footnote 25).

Petitioners argue that, under *Larson,* it can be said that suit is not one against the United States only where government officials act beyond their statutory authority or under an unconstitutional statute. But where, as here, possession is obtained under a pledge, there is neither statutory authority nor constitutional power to retain possession after the debt is paid. The officials then act as individuals. They act "in excess of their authority as public officers" (*Land v. Dollar,* supra, at 738). The transaction having been a pledge, the refusal to surrender was an unconstitutional deprivation as defined in the main opinion in *Larson* (337 U.S. at 697), and, as there stated (p. 697), in such a situation suit lies under the doctrine of *United States v. Lee,* supra.

The petition comments (p. 14) that the author of the opinion in *Land v. Dollar* concurred in the *Larson* decision. It is to be

noted that he did so precisely on the distinction noted above, i.e., that the principles announced in *Larson* "are the ones which should govern the selling of government property" (337 U.S. at 705).

It is evident that petitioners' Question No. 1 (Pet. 2, 3) is erroneous. This is not a suit contesting the "title" of the United States to property in "its" possession. It is not (as asserted, Petition p. 16) a case where the "government" is making a claim to ownership. This is a possessory action. The subject matter is possession, not title. The contract being a pledge and the debt paid, possession is in the hands of individuals, not the United States. This Court has so held in *Land v. Dollar.*

II.

The Court Below Has Not Departed from the Principles of Rule 52(a), R.C.P.

The court below prefaced its consideration of the facts by stating (R. 2145), "The rule by which we are guided in our examination of the findings of the trial court in this case was laid down by the Supreme Court in *United States v. Gypsum Co.*"

It then quoted that statement in the *Gypsum* case (333 U.S. 364) that under Rule 52(a) a finding is "clearly erroneous," and the appellate court may reverse it, "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (R. 2145, 2146.) It then quoted from *Orvis v. Higgins,* 180 F.2d 537, in which this Court denied certiorari October 9, 1950. (R. 2146.)

After then carefully reviewing the facts it said (R. 2153):

> "It seems *plain beyond question* that if this transfer had occurred between two private individuals no court of equity would have treated the transfer of the shares as other than a pledge."

Again (R. 2157):

> *"Any other conclusion,* if the transaction were between private parties, *would be wholly untenable* in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party."

Still again, it described petitioners' reasoning as *"fallacious logically"* and as leading "us far from the actual and essential nature of the transaction." (R. 2158).

The gist of petitioners' argument is that the court did not use the exact words that the finding of the District Court was "clearly erroneous" or that the court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

But what the court did say is the equivalent. Certainly it is not necessary for a Court of Appeals to use, slavishly, ritualistic language. Petitioners' argument is mere formalism.

Petitioners argue that where the evidence permits two reasonable inferences, an appellate court may not set aside the choice made by the trial court. But the court below held that there was no choice of reasonable inferences here. The choice made by the trial court was, it said, *"wholly untenable."* Petitioners select language from the opinion to the effect that the decision depended upon the comparative evaluation of various indices some pointing one way and some another. But it is a *non sequitur* that both inferences were reasonable. The court catalogued and reviewed every argument advanced by petitioners to support the construction of the contract as a sale, and it found none of them persuasive (R. 2149-2151). Then it catalogued and reviewed every argument of respondents (R. 2151-2152). While it felt that some were inconclusive, it found the force of others inescapable. Moreover, the question was not what conclusion should be drawn if there were only one item of evidence in the record, or only one of several indices, but the conclusion called for by the whole body of evidence, by all indices taken in conjunction. And on "the entire evidence" the Court of Appeals was of the definite

and firm conviction that no view other than a pledge was tenable.*

Under Rule 52(a) the power of a Court of Appeals to reverse a finding is not confined to cases where the inference drawn by the trial court is not tenable at all:—"although there is evidence to support it," the appellate court may reverse when "on the entire evidence" it is firmly convinced that it is wrong *(United States v. Gypsum Co.*, supra). *A fortiori*, it may do so when, as here, it is convinced that the trial court's determination is "wholly untenable."

Petitioners assert that there was conflicting evidence in the case, and they talk of credibility of witnesses. But the Court of Appeals tells us otherwise:—"the findings of the trial judge rested entirely upon documentary evidence or undisputed basic facts" (R. 2146). This statement of the Court of Appeals is correct. The trial court's opinion, which that court adopted as its finding (R. 276), contains no reference to credibility or to any conflict in evidence (R. 269-275). It shows on its face that

United States v. Yellow Cab Co., 338 U.S. 338, cited by petitioners, was not a certiorari case but came before this Court on a direct appeal. In his brief in opposition to certiorari in *Orvis v. Higgins*, October Term, 1950, No. 56, certiorari denied Oct. 9, 1950, the Solicitor General said:

> "*United States v. Yellow Cab Co.*, 338 U.S. 338, does not preclude the substitution by the Court of Appeals of its factual conclusion for that of the District Court in the circumstances of this case. On the contrary, this Court there reaffirmed the duty of the appellate court to correct a finding of fact which is clearly erroneous but summarized that case as being one in which the trial court's ultimate findings were not erroneous since the trial court had made factual choices between two permissible views, either of which would have been supported by the evidence, and since the findings, in so far as they related to intent, depended peculiarly upon the credit given to witnesses by the trial court. * * * As the opinion of the Court of Appeals makes amply clear, those circumstances are not present in this case. There is thus no conflict with the *Yellow Cab* decision."

We adopt that statement as precisely applicable here.

its finding was a mere deduction from undisputed facts.* *Nor does the petition point to a single instance of conflict.* On no matter upon which any witness orally testified has there ever been any dispute, contradiction or issue of credibility. None has ever been pointed to in any brief at any stage, and *none is pointed to in the petition.*†

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*There was only one disputed fact in the case—the value of ships of Dollar of Delaware mortgaged to the United States. On this the trial court refrained from making any finding at all (R. 275). And this issue the Court of Appeals similarly found it unnecessary to decide (R. 2155).

†The petition asserts (p. 18) that "on the question of intent of the parties to the transaction" there were 6 witnesses for respondents and 7 for petitioners. This assertion is entirely erroneous and must be the result of unfamiliarity with the record.

Of the 6 witnesses called by petitioners, the testimony of one (Graustein) was excluded and of another (Moon) stricken by the trial court (R. 1947, 1953, 1765, 1767, 1773, 1774). Another (Poole, R. 1847-1851) merely gave an accounting opinion as to stock value based on hypothetical assumptions as to asset values. Two others testified to trifles the truth of which is not disputed, although their relevance was; one of the two (Reavis) merely testified that the Commission had never made a repair loan to any other company (R. 1953); the other (Roland) merely testified that at a date subsequent to the execution of the contract she mailed a press release (R. 1834). As to the others, respondents relied on their testimony and welcomed it (Wilcox, R. 1816; Laughlin, R. 1774). In respondents' reply brief in the court below we said (p. 34), "On this appeal we take the testimony of Mr. Laughlin (defendants' witness) wherever he positively testified to anything as a fact."

Of the 6 witnesses called by respondents, one (Hopkins) merely identified papers dated October 1937 (R. 493). Two (Radner and Houlihan) (R. 545, 966), former officials of the Commission, testified only to events preceding May 1938, a time when not even petitioners deny that the discussions pertained to security only (cf. R. 2154). Their testimony has never been questioned. Two (Hall, R. 416, 1273, Dunham, R. 2031) gave purely accounting testimony, also never questioned. As to the sixth (Dollar, R. 768, 1167) no fact testified to by him has ever been questioned, the trial court stated that it believed him (e.g., R. 976), and his testimony does not enter into the decision of the court below. Dollar testified that no mention was made of "sale" or "outright transfer" in the oral

In short, the Court of Appeals approached the case with a full understanding of the principles which govern review of findings and with the clearest intention to apply those rules, and it decided the case with the firm conviction that it had done so. And in fact it did.

Furthermore, the issue on which the court below reversed the trial court was the interpretation or construction of a contract. When, as here, the construction of a contract is to be reached from undisputed facts, it presents an issue of law, not of fact. *Bell and Grant v. Bruen*, 1 How, 169 183; *Copp v. Van Hise*, 119 F.2d 691, 695 (9 Cir.); cf. *Kuhn v. Princess Lida of Thurn and Taxis*, 119 F.2d 704, 705, 706 (3 Cir.).

The remainder of the petition (pp. 20, et seq.) is no more than a complaint that the court below erred in its conclusion that the finding of the trial court was clearly erroneous. *Such a complaint merely asks this Court to review and reweigh the evidence.* The question whether the trial court's finding was clearly erroneous was an issue for the Court of Appeals to decide. Whether it erred is not a question of general importance. We submit that it is not the kind of question which warrants the granting of certiorari. If it were, this Court would be reviewing every case where a Court of Appeals reversed a finding. Petitioners are, in this respect, just one more group of disappointed litigants in just another factual case.

We take it to be elementary that in the exercise of its certiorari jurisdiction this Court is not and should not be concerned with the facts of a particular case or the interpretation of a particular contract, for every contract stands on its own feet.

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discussions with Laughlin (R. 1169); Mr. Laughlin admitted that to be so, testified that nothing more was said than appears in the written agreement, and said that the word "pledge" was not used either (R. 1800, 1801), but Dollar did not say that it was. There was no conflict between them.

Respondents submitted the case in the court below with the statement that the testimony of petitioners' witnesses "was largely irrelevant and was excluded and what was admitted may be accepted" (opening brief, p. 114).

This Court has often said that "We do not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston,* 268 U.S. 220, 227, or "to review the evidence or inferences drawn from it," *General Pictures Co. v. Electric Co.,* 304 U.S. 175, 178, or to "give the defeated party in the Circuit Court of Appeals another hearing" on matters peculiar to a single controversy. *Magnum Import Co. v. Coty,* 262 U.S. 159, 163. *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508. And it has called on the bar to cooperate by not presenting applications for certiorari where the questions raised relate to particular contracts and turn on the facts of particular cases.*

With that admonition in mind, we refrain from embarking on a discussion of the evidence, which overwhelmingly supports the decision of the court below. A summary appears in the opinion of the court below, and petitioners do not question its fairness.

CONCLUSION

The court below made no decision of any question of federal law. On the contrary, it simply followed the law of the case established by this Court, as it was bound to do. Its decision was not based upon interpretation of any federal statute, any treaty,

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*Cf. remarks of Chief Justice Hughes before the American Law Institute in June 1934 (20 American Bar Ass'n Journal 341):

> "As litigation increases, we cannot hope to discharge this duty [of passing upon applications for certiorari] and keep the Court abreast of its proper work, without the cooperation of the Bar. And the cooperation we need must be found in the self-imposed restraint which will prevent lawyers from presenting applications which are devoid of merit. * * * For example, we have many applications where the questions raised are those relating to particular contracts or transactions and turn upon the facts of particular cases, and there is no controversy of importance with respect to legal principles."

And see remarks of Chief Justice Vinson before the American Bar Association, September 7, 1949 (70 S. Ct. xiii).

or the Constitution of the United States. It presents no conflict with any decision of this court or any Court of Appeals.

The petitioners assert that the government will profit financially if respondent's suit to recover is defeated, and on this ground they urge that the petition should be granted (Pet. 16). Apart from the fact that the government has yet to assert any claim in the premises and that the assertion is merely that of individuals, the financial stake of the government in defeating a suit offers no reason for this Court to grant a review. All that the court below did was to interpret a contract, and the monetary consequence of that interpretation does not call for the application of different principles than those governing the grant of certiorari in any other suit.

The litigation is about to enter its sixth year. It is submitted that the time has come when, paraphrasing what this Court has said in this case (see p. 6, supra), the dominant interest of the sovereign is on the side of the victim who has brought this possessory action; instead of protracting the suit that interest should bring it to an end with a surrender of the property wrongfully withheld for so long.

It is respectfully submitted that the petition should be denied.

Dated, San Francisco, California, October 26, 1950.

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